S.B.Civil Misc. Appeal No.1381/2005

Gordhan Das vs. Anand Singh and others.

Date : 10.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. Sachin Acharya, for the appellant.

Mr. NS Acharya, for the respondents.

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At the request of learned counsel for the parties, the matter is finally heard and decided.

Brief facts of the case are that the plaintiffs filed a suit for permanent injunction against the defendants including the appellant. The plaintiffs'case was that they are residents near Prakash Chitra Cinema and behind that cinema hall, there is an open public chowk. It is alleged that the portion of the said open chowk is said to be given to the petitioner/defendant no.3. The plaintiffs being residents of locality felt that there will be public nuisance because of that allotment and otherwise also, the plaintiffs have the right to use the public chowk. Very many other grounds were raised by the plaintiffs in their suit. The trial court by its judgment and decree dated 19.11.2003 dismissed the suit of the plaintiffs.

The plaintiffs preferred regular first appeal against the judgment and decree dated 19.11.2003 which was partly allowed by the first appellate court. The first appellate court set aside the judgment and decree passed by the trial

court after setting aside the finding of the trial court recorded on issues no.1 to 3 and remanded the matter back to the trial court for deciding the suit afresh.

It will be worthwhile to mention here that in the ultimate order, the first appellate court gave a direction to the trial court that the trial court shall consider the judgments cited by both the parties and evidence available on record and further directed that further opportunity to lead evidence be given to the parties.

Learned counsel for the petitioner vehemently submitted that the first appellate court committed serious error of law in remanding the matter to the trial court that too after setting aside the findings recorded by the trial court on issues no.1 to 3. It is also submitted that there was no reason for allowing further evidence to the parties and in this case, sufficient opportunity was given to both the parties to lead evidence and if they failed, then they cannot be permitted to lead evidence. It is also submitted that the suit cannot be remanded to the trial court for considering the judgments which were/may have been cited by the parties before the trial court and those were not considered by the trial court. It is also submitted that the first appellate court should have decided the suit itself on the basis of the evidence which is available on record. It is also submitted that after recording findings on issues no.1 to 3, there was no reason for the first appellate court to send the matter back to the trial court.

Learned counsel for the plaintiffs also submitted that in fact, no sufficient evidence has been produced by the defendants and the suit of the plaintiffs should have been decreed by the first appellate court. It is also submitted that the present litigation is not substantially a personal litigation only but is a litigation which may give benefit to the public at large also. It is also submitted that the law has been totally violated by the Municipal Council, Bikaner and the land in question cannot be given the petitioner/defendant no.3.

Learned counsel for the non-petitioner tried to invite this Court's attention to the merits and demerits of this case and submitted that the suit of the plaintiff should have been dismissed by the first appellate court but if the first appellate court gave opportunity to parties to produce evidence and remanded the matter to the trial court, the appellate court has not committed any error of law.

I have considered the submissions of learned counsel for the parties and perused the facts of the case and the reasons given by the courts below.

So far as the order of the first appellate court is concerned, that on the face of it is self contradictory because of the simple reason that when the first appellate court set aside the judgment and decree of the trial court and remanded the matter back in toto for deciding afresh, then the first appellate court should not have recorded findings on merits of issues no.1 to 3. The matter should

have been left for the trial court to be decided. Order 41 Rule 27 CPC provides that the appellate court on application of any of the parties may permit production of additional evidence and the same provision also empowers the appellate court to take additional evidence which the appellate court thinks that that evidence is necessary for deciding the case or issue involved in the case. It appears that the first appellate court was of the view that the matter requires more evidence looking to its nature, therefore, if the first appellate court has allowed both the parties to produce evidence looking to the aforesaid facts of the case, this Court is not inclined to interfere in the order passed by the first appellate court. Once the parties are permitted to lead evidence on all the issues, the trial court is required to decide the suit on merits in accordance with the evidence which may come on record uninfluenced by order of remand on the issues for which parties were allowed to produce evidence.

In view of the above peculiar facts and circumstances of the case might have prompted the first appellate court to remand the matter.

This Court is conscious that the short cut method of deciding the appeal by remand is not only not appreciated but by this Court but even deprecated but in this case since the issue involved may be in larger public interest, this Court is not inclined to interfere in the impugned order. Technicalities of law can be ignored so as to advance cause of justice and no one can be allowed to win

by default in such manner.

In view of the above, this appeal, having no force, is hereby dismissed. Both the parties are directed to remain present before the trial court on 1.8.2006 and the trial court is requested to decide the suit expeditiously preferably within a period of one year from the said date.

So far as involvement of public interest in present litigation is concerned, that is also a disputed question of fact, therefore, any observation made above may not be construed to mean recording of any finding about public interest. The trial court shall decide the suit not influenced by any observations made in this order on merits of the issues.

(PRAKASH TATIA), J.

S.Phophaliya